(15)

Supreme Court, U.S.
FILED
APR 8 1999
CLERK

No. 98-149

In the Supreme Court of the United States

OCTOBER TERM, 1998

COLLEGE SAVINGS BANK, PETITIONER

v.

FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

19 pp

TABLE OF AUTHORITIES

Cases:	Page
Alfred L. Snapp & Son, Inc. v. *Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982)	9, 10
Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985)	4
Edelman v. *Jordan*, 415 U.S. 651 (1974)	4
Employees of the Dep't of Public Health & Welfare v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973)	2
FDIC v. *Meyer*, 510 U.S. 471 (1994)	13
Federal Housing Admin. v. *Burr*, 309 U.S. 242 (1940)	13
Florida Dep't of Health & Rehabilitative Servs. v. *Florida Nursing Home Assn.*, 450 U.S. 147 (1981)	13
Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)	8
International Primate Protection League v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72 (1991)	13
Lane v. *Peña*, 518 U.S. 187 (1996)	4, 5
Loeffler v. *Frank*, 486 U.S. 549 (1988)	13
Massachusetts v. *United States*, 435 U.S. 444 (1978)	11
MCI Telecomms. Corp. v. *Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir. 1999)	7
New York v. *United States*, 326 U.S. 572 (1946)	10, 11
New York v. *United States*, 505 U.S. 144 (1992)	5
Parden v. *Terminal Ry. of the Ala. State Docks Dep't*, 377 U.S. 184 (1964)	1, 2, 6, 7, 8
Pennhurst State Sch. and Hosp. v. *Halderman*, 451 U.S. 1 (1981)	5-6
Pennsylvania v. *Union Gas Co.*, 491 U.S. 1 (1989)	2, 3-4
Reeves, Inc. v. *Stake*, 447 U.S. 429 (1980)	8
Seminole Tribe v. *Florida*, 517 U.S. 44 (1996)	1, 2, 3

Cases—Continued: Page

South Carolina v. *Baker*, 485 U.S. 505 (1988) 11
South Dakota v. *Dole*, 483 U.S. 203 (1987) 5
United States v. *California*, 507 U.S. 746 (1993) 10
United States v. *Mitchell*, 445 U.S. 535 (1980) 6
United States v. *Nordic Village, Inc.*, 503 U.S. 30 (1992) 6
Welch v. *Texas Dep't of Highways & Public Transp.*, 483 U.S. 468 (1987) 2, 3

Constitution and statutes:

U.S. Const.:
Art. I 3
§ 8, Cl. 1 (Spending Clause) 4, 5
§ 8, Cl. 3 (Commerce Clause) 1
Amend. XI ..... *passim*
Lanham Trade-Mark Act, 15 U.S.C. 1051 *et seq.* 7, 14, 15
Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.* 5
Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 14
Trademark Remedy Clarification Act, Pub. L. No. 102-542, 106 Stat. 3567 ..... 8, 14, 15
§ 4, 106 Stat. 3568 (15 U.S.C. 1114 note) 15
11 U.S.C. 106(b) 7
Fla. Stat. Ann. (West Supp. 1999):
§ 240.551(5)(a) 13
§ 240.551(6)(d) 13
§ 240.551(7)(b) 13
§ 240.551(10)(b) 12
§ 240.551(16)(a) 12

Miscellaneous:

Florida Prepaid Master Covenant (1995-1996) 12

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-149

COLLEGE SAVINGS BANK, PETITIONER

v.

FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. Respondent contends (Resp. Br. 23-30) that this Court's decision in *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), is inconsistent with *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and should therefore be overruled. That argument cannot be reconciled with *Seminole Tribe* itself. The Court in that case held that the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, does not empower Congress to abrogate an unconsenting State's Eleventh Amendment immunity from suit in federal court. See Gov't Br. 25. The *Seminole Tribe* Court squarely rejected the contention that its holding was at odds with *Parden*, which it characterized as "a case holding the unremarkable, and completely unrelated, proposition

that the States may waive their sovereign immunity." 517 U.S. at 65.

As we acknowledge in our opening brief (at 27-28 n.8), *Parden* is susceptible of a broad reading that would render it inconsistent with *Seminole Tribe*. The *Parden* Court stated, for example, that "when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." 377 U.S. at 196. That passage suggests that Congress may permissibly provide for suit against a State in federal court whenever the State's conduct is subject to substantive federal regulation. To treat all conduct regulable by the federal government as a "waiver" of Eleventh Amendment immunity would indeed eviscerate the distinction between waiver and abrogation. See Gov't Br. 27-28 n.8; *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 44 (1989) (Scalia, J., concurring in part and dissenting in part).

As we explain in our opening brief (at 23-24), however, subsequent decisions of this Court have significantly qualified *Parden*, while leaving its core principles intact. Thus, in *Employees of the Department of Public Health & Welfare* v. *Department of Public Health & Welfare*, 411 U.S. 279, 284 (1973), the Court distinguished the railroad involved in *Parden*—a for-profit business that operated "in the area where private persons and corporations normally ran the enterprise"—from institutions (such as hospitals) that had traditionally been run by state officials on a nonprofit basis. In *Welch* v. *Texas Department of Highways & Public Transportation*, 483 U.S. 468 (1987), the Court held that federal statutes will not be construed to subject the States to suit in federal court

absent an unequivocal expression of that intent. *Id.* at 476-478 (plurality opinion); *id.* at 495-496 (Scalia, J., concurring in part and concurring in the judgment). Thus, even if a State's conduct is subject to substantive federal regulation, it will not be treated as a waiver of Eleventh Amendment immunity unless (a) it is sufficiently removed from the core functions of the State that it can reasonably be treated as a voluntary choice, and (b) Congress has unambiguously provided that a State that engages in such conduct will be subject to suit in federal court.

So qualified, the doctrine of implied waiver is fully consistent with *Seminole Tribe*. This Court's holding that the Eleventh Amendment prevents Congress from using its Article I power to authorize "suits by private parties against unconsenting States," *Seminole Tribe*, 517 U.S. at 72, simply does not speak to the issue of when a State's consent to suit in federal court can properly be inferred. More specifically, nothing in *Seminole Tribe* casts doubt on the proposition that a State's voluntary entry into the commercial marketplace may properly be treated as a waiver of Eleventh Amendment immunity, provided that Congress has made that consequence of the State's action unmistakably clear.[1]

---

[1] The plaintiffs in *Seminole Tribe* alleged that the defendant State had breached its federal statutory obligation to enter into negotiations with tribal officials concerning a Tribal-State compact that would have defined the terms under which Indian gaming would be permitted within Florida. 517 U.S. at 48-52. The case thus involved a challenge to the State's exercise of its regulatory powers. *Union Gas* likewise arose out of a State's involvement in distinctly governmental activity—the operation of a flood-control

2. As our opening brief explains (at 14-20), this Court and the federal courts of appeals have recognized in a variety of contexts that a State may impliedly waive its Eleventh Amendment immunity by voluntarily engaging in conduct that Congress has clearly provided will subject the State to suit in federal court. Our opening brief explains, in particular, that Congress may condition the acceptance and receipt of federal funds on a State's waiver of immunity from suit in federal court. Gov't Br. 14-15. Respondent finds it "doubtful" (Br. 32) that such a Spending Clause statute would be constitutional.

Although this Court has not squarely resolved the question, its precedents strongly suggest that the disbursement of federal funds to a State may properly be conditioned on the State's waiver of Eleventh Amendment immunity. In both *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 247 (1985), and *Edelman* v. *Jordan*, 415 U.S. 651, 672-674 (1974), the Court rejected the contention that the state defendants had waived their Eleventh Amendment immunity by accepting federal funds. In each of those cases, however, the Court based its decision on the fact that the relevant funding statute did not make clear that, by accepting the funds, recipient States would thereby subject themselves to suit in federal court. See Gov't Br. 15-16 n.5. That mode of analysis would have been unnecessary if Congress lacked power to condition federal largesse on a waiver of Eleventh Amendment immunity. In *Lane* v. *Peña*, 518 U.S. 187, 198 (1996), the Court observed that Congress had amended the

---

project. 491 U.S. at 5. Neither case involved a State's operation of a commercial enterprise in competition with other market participants.

Rehabilitation Act of 1973 (which imposes nondiscrimination obligations upon the recipients of federal funds) in order "to provide the sort of unequivocal waiver that [the Court's] precedents demand." See also *id.* at 200 (noting "the care with which Congress responded to [the Court's] decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity"). In any event, respondents offer no basis for treating the Eleventh Amendment as an exception to the general rule that Congress through its spending power may encourage state choices that it could not constitutionally compel. Compare *South Dakota* v. *Dole*, 483 U.S. 203, 207-211 (1987); *New York* v. *United States*, 505 U.S. 144, 167, 171-172 (1992).

Indeed, what is especially illuminating for present purposes is the manner in which the Court's Spending Clause precedents have approached the subject of a State's consent to funding conditions. The Court has explained that

> legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1, 17 (1981) (citations omitted). Absent from that reasoning is any suggestion that a State must explicitly declare its consent to the congressionally mandated conditions. Rather, a State is *assumed* to have "voluntarily and knowingly accept[ed] the terms of the 'contract'" if Congress defines the applicable conditions unambiguously and the State thereafter accepts the money. There is consequently ample support in this Court's jurisprudence for our contention that a State's conduct may under appropriate circumstances be treated as a waiver of Eleventh Amendment immunity, even though the State has made no express declaration of its willingness to be sued in federal court.[2]

3. Respondent also argues (Br. 33-34) that even if Congress could permissibly require a waiver of Eleventh Amendment immunity as a condition of receiving federal funds, the present case is different

---

[2] Contrary to the contention of amicus National Conference of State Legislatures, et al. (Br. 18), there is no inconsistency between the waiver principle recognized in *Parden* and the established rule that the United States' "waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) (internal quotation marks omitted). The import of the latter rule is simply that an ambiguous federal statute will not be construed to waive the federal government's sovereign immunity. See *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). In the context of state waivers of Eleventh Amendment immunity, that principle is honored so long as the governing federal statute makes unmistakably clear that a State, by engaging in specified voluntary conduct, will subject itself to suit in federal court. The State's conduct itself constitutes an "unequivocal[] express[ion]" of the State's consent to be sued—just as a State's receipt of federal funds is treated as an acceptance of any "contractual" conditions that are unambiguously set forth in the governing federal law.

because Congress has not provided any *quid pro quo* in return for the State's amenability to suit in federal court. Although we believe that the propriety of an implied waiver of Eleventh Amendment immunity is particularly clear when the State thereby procures advantages not available to private parties, Congress need not provide such distinct advantages in order for the waiver to be valid.[3] Indeed, even the dissenting Justices in *Parden* "agree[d] that it is within the power of Congress to condition a State's permit to engage in the interstate transportation business on a waiver of the State's sovereign immunity from suits arising out of such business." 377 U.S. at 198 (White, J., joined by Douglas, Harlan, and Stewart, JJ., dissenting); see Gov't Br. 22-23.

As our opening brief explains (at 28), moreover, respondent (no less than other market participants) does obtain significant benefits from the fair-competition requirements of the Lanham Trade-Mark Act (Lanham Act). And contrary to respondent's contention (Br. 34), the distinction between waiver and abrogation can be preserved without requiring that the State receive some special advantage (*i.e.*, a benefit not available to the public) in return for its waiver of Eleventh Amendment immunity. As the Seventh Circuit has explained, the difference between waiver and abrogation "turns on the voluntariness of the state's choice in the waiver situation—a choice between

---

[3] As we explain in our opening brief (at 19-20), for example, the courts of appeals have generally upheld the validity of the Bankruptcy Code provision (11 U.S.C. 106(b)) that treats a State's filing of a proof of claim as a waiver of sovereign immunity with respect to specified claims, even though that provision confers no special advantages upon the States.

waiving its immunity or foregoing participation in the federal statutory scheme at issue. When Congress gives states a genuine choice, clearly stated, as to whether or not to waive their sovereign immunity, the doctrine of constructive waiver survives *Seminole Tribe*." *MCI Telecomms. Corp.* v. *Illinois Commerce Comm'n*, 168 F.3d 315, 321 (7th Cir. 1999). So long as particular state conduct is sufficiently removed from core government functions that it can properly be deemed a voluntary choice, Congress may condition the State's participation in that activity on a waiver of Eleventh Amendment immunity, regardless of whether the State receives a *quid pro quo* that is not provided to the general public.[4]

4. Respondent and one of its amici argue that (a) no coherent distinction can be drawn between state activities that are and those that are not sufficiently voluntary to constitute a valid implied waiver of Eleventh

[4] Congress might have prohibited a State-run enterprise like respondent from operating in interstate commerce unless and until the State had executed an appropriate "express" waiver of Eleventh Amendment immunity. The remedial provisions of the Trademark Remedy Clarification Act, Pub. L. No. 102-542, 106 Stat. 3567 (TRCA) are simply an alternative means of accomplishing the same objective. Cf. *Parden*, 377 U.S. at 198 (White, J., joined by Douglas, Harlan, and Stewart, JJ., dissenting) ("I agree that it is within the power of Congress to condition a State's permit to engage in the interstate transportation business on a waiver of the State's sovereign immunity from suits arising out of such business. Congress might well determine that allowing regulable conduct such as the operation of a railroad to be undertaken by a body legally immune from liability directly resulting from these operations is so inimical to the purposes of its regulation that the State must be put to the option of either foregoing participation in the conduct or consenting to legal responsibility for injury caused thereby.").

Amendment immunity, and (b) if such a line can be drawn, respondent's own activities represent the performance of core governmental functions rather than the operation of a commercial enterprise. Those arguments are erroneous.

a. Relying primarily on *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), amicus Regents of the University of California argues (Br. 13-17) that no principled distinction can be drawn between "voluntary" state activities and traditional governmental functions, and that the Court's prior efforts to draw such distinctions have been abandoned as unworkable. That contention is incorrect. The *Garcia* Court did conclude that the susceptibility of state and local governmental entities to substantive federal regulation should not turn on whether those entities perform "traditional governmental functions," and it stressed the difficulty of making that determination in a consistent fashion. In other circumstances, however, this Court has recognized that different categories of activities undertaken by state governments are subject to different legal rules, depending on their relation to core governmental functions.

Thus, as we explain in our opening brief (at 29-30), a State may generally give its own citizens preferential treatment when it acts as a "market participant," even though it is prohibited from doing so when it acts in its regulatory capacity. That rule considerably enhances the States' flexibility and in part reflects the premise that "state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 439 (1980). A similar distinction underlies the application of *parens patriae* principles to state governments. In *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*

ex rel. Barez, 458 U.S. 592 (1982), the Court observed that a State has both "sovereign" and "proprietary" interests, and that "[a]s a proprietor, it is likely to have the same interests as other similarly situated proprietors." *Id.* at 601. The Court held (*id.* at 601-602) that a State may maintain a *parens patriae* suit only when it asserts a sovereign or quasi-sovereign interest. Indeed, this Court has applied a similar mode of analysis in determining the rights of the federal government as a litigant. See *United States* v. *California*, 507 U.S. 746, 757-758 (1993) (susceptibility of United States to state statute of limitations may vary depending on whether the government appears in the case "in its sovereign capacity" or as the subrogee of a private contractor).[5]

---

[5] Amicus Regents of the University of California errs in relying (see Br. 14) on *New York* v. *United States*, 326 U.S. 572 (1946). The amicus correctly notes that all eight Justices who participated in that case rejected the distinction between "governmental" and "proprietary" activities as a basis for determining the susceptibility of States to federal taxation. The Court did not, however, embrace the proposition that *no* distinction between various categories of state activities could permissibly be made. To the contrary, four of the six Justices who comprised the majority specifically stated that "a federal tax which is not discriminatory as to the subject matter"—*i.e.*, one that applies to state and private taxpayers alike—"may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government." *Id.* at 587 (Stone, C.J., joined by Reed, Murphy, and Burton, JJ., concurring). Those Justices concluded that "when * * * the subject of taxation is State property or a State activity," the Court must "consider whether such a non-discriminatory tax unduly interferes with the performance of the State's functions of government. If it does, then the fact that the tax is non-discriminatory does not save it." *Id.* at 588. At the same time, those four Justices rejected the contention that all activities

b. Respondent contends (Br. 35-40) that its own operations are integral to the State's fulfillment of its educational mission and are therefore properly characterized as "traditional" or "core" governmental functions. We agree that the operation of schools and the establishment of educational policy have traditionally been among the most important functions undertaken by state governments. But the services provided by respondent are not themselves traditional state activities (Florida Prepaid did not commence operations until 1988); they are separate and distinct from the State's operation of public colleges and universities; and they are not meaningfully different from services provided by respondent's private competitors.

Respondent asserts (Br. 39) that its "contracts are not investment vehicles; they are agreements to purchase college services by advance payment." That characterization is at least potentially misleading. Respondent is a corporate entity separate and distinct

---

conducted by state officials should be immune from federal taxation, explaining that "[t]he national taxing power would be unduly curtailed if the State, by extending its activities, could withdraw from it subjects of taxation traditionally within it." *Id.* at 589.

The basis for those Justices' rejection of the "governmental"/"proprietary" distinction is not altogether clear. The Justices may have found the dichotomy to be a false one, since even "proprietary" state activities are also "governmental" in that they are conducted by public officials and are presumably intended to further public purposes. In any event, four of the six Justices in the *New York* majority unequivocally embraced an approach under which the susceptibility to federal taxation of state activities turns on their centrality to the operations of state government. See also *Massachusetts* v. *United States*, 435 U.S. 444, 457-458 & nn. 14-15 (1978) (plurality opinion) (discussing *New York*); *South Carolina* v. *Baker*, 485 U.S. 505, 523-524 n.14 (1988) (same).

from any of the State's colleges and universities. It does not assume a contractual obligation to provide "college services" (*e.g.*, classroom instruction) to the beneficiaries of its advance payment contracts. Rather, its primary obligation is "[t]o make payments to state postsecondary institutions on behalf of qualified beneficiaries" in accordance with the contractual terms. Fla. Stat. Ann. § 240.551(16)(a) (West Supp. 1999). Moreover, the beneficiary is permitted to utilize the funds available under the contract for attendance at an out-of-State college or university.[6] Although the services that respondent provides undoubtedly enhance the ability of Florida residents to derive the benefits of the State's postsecondary educational institutions, those services do not involve the actual operation of schools or the establishment of educational policy, and they do not differ in any fundamental way from the services offered by petitioner College Savings Bank.

Other features reinforce the similarity between respondent and purveyors of competing investment pro-

[6] "A qualified beneficiary may apply the benefits of an advance payment contract toward an eligible out-of-state college or university. An out-of-state college or university which is not for profit and is accredited by a regional accrediting association, and which confers baccalaureate degrees, shall be eligible for such application. The board shall transfer, or cause to have transferred, an amount not to exceed the redemption value of the advance payment contract or the original purchase price plus 5 percent compounded interest, whichever is less, after assessment of a reasonable transfer fee." Fla. Stat. Ann. § 240.551(10)(b) (West Supp. 1999); see also Florida Prepaid Master Covenant § 3.05 ("The Board may transfer [to an eligible out-of-state institution] an amount not to exceed the current rates at Florida public institutions, or the original purchase price plus 5% interest compounded annually, whichever is less, after assessment of a $25.00 transfer fee.").

ducts. Respondent was "created as a body corporate with all the powers of a body corporate for the purposes [of administering the program]." Fla. Stat. Ann. § 240.551(5)(a) (West Supp. 1999). To carry out its functions, respondent may engage in commercial and business transactions with the public, and it has the power to "[s]ue and be sued." See Fla. Stat. Ann. § 240.551(7)(b) (West Supp. 1999).[7] Respondent is directed by statute to employ "a centralized marketing agent * * * for the marketing of the program." Fla. Stat. Ann. § 240.551(6)(d) (West Supp. 1999). Finally, as we note in our opening brief (at 27), respondent has been highly profitable, amassing a surplus of more than $184 million during the first seven years of its operations. Pet. App. 49a.[8]

[7] In *Federal Housing Administration* v. *Burr*, 309 U.S. 242 (1940), this Court suggested that when the legislature "launche[s] a governmental agency into the commercial world and endow[s] it with authority to 'sue or be sued,'" it is presumed that the agency is to be treated like any other business entity and that it is "not less amenable to judicial process than a private enterprise under like circumstances would be." *Id.* at 245. See also *FDIC* v. *Meyer*, 510 U.S. 471, 481 (1994) ("agencies 'authorized to "sue and be sued" are presumed to have fully waived immunity'") (quoting *International Primate Protection League* v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72, 86-87 n.8 (1991)); *Loeffler* v. *Frank*, 486 U.S. 549, 554-555 (1988). We recognize that a State's general waiver of sovereign immunity for one of its agencies does not itself constitute a waiver of Eleventh Amendment immunity from suit in federal court. *Florida Dep't of Health & Rehabilitative Servs.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981). The existence of a "sue and be sued" clause nevertheless suggests that the State regards respondent as an entity functionally akin to a private business corporation.

[8] Respondent asserts (Br. 40 n.17) that it "has not earned a profit merely because it holds a reserve to pay future education expenses." The amici States of Ohio, et al., go further, characteriz-

5. Neither the Lanham Act (which prohibits false advertising of goods and services marketed in interstate commerce) nor the TRCA (which authorizes private Lanham Act suits against state defendants in federal court, see Gov't Br. 2-5), is specifically directed at prepaid tuition programs or commercial investment products. Respondent argues (Br. 41) that because "[t]he TRCA does not regulate state prepaid tuition programs or any related financial programs or products," but "simply applies to commerce *in general*," the Act "cannot reasonably be interpreted to alert States to the possibility of the loss of sovereign immunity resulting from participation in a defined type of commerce." Respondent does not and could not dispute, however, that both the Lanham Act and the TRCA unambiguously apply to its operations. See Gov't Br. 25-26. The breadth of coverage of the relevant statutes in no way deprived respondent of fair warning that it could be subjected to suit in federal court for conduct that violated the Lanham Act.[9]

---

ing respondent's program (Br. 11) as "a form of financial aid for higher education." As the district court explained, however, "[t]he $184 million represents the present value amount by which 'the expected value of assets exceeds the expected value of liabilities' as stated by Ernst & Young, [respondent's] accounting firm." Pet. App. 49a n.12. The $184 million is therefore "profit" under any reasonable understanding of that term, whether or not respondent was established for a profit-making objective.

[9] Respondent's reliance (Br. 39 & n.16) on Section 1806 of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755, is misplaced. Section 1806 reflects Congress's determination that State-run prepaid tuition programs should receive tax advantages not available to their private competitors. Congress declined, however, to take the further step of exempting such programs from either the Lanham Act's substantive requirements or the remedial provisions of the TRCA. To the extent that Section 1806 is relevant at all, it supports rather than

Respondent also points out (Br. 43) that the TRCA was not enacted until 1992, four years after respondent began its operations. Respondent argues (Br. 44) that "[n]othing in *Parden* suggests that Congress can extract a *retroactive* waiver from States engaged in activities newly subject to legislation." Section 4 of the TRCA states, however, that the Act "shall take effect with respect to violations that occur on or after the date of the enactment of this Act [October 27, 1992]." 106 Stat. 3568 (15 U.S.C. 1114 note). The TRCA therefore does not subject respondent to any "retroactive" obligation, notwithstanding the fact that respondent commenced its operations before the statute was enacted.

There is, in sum, no constitutional principle entitling respondent to participate in a commercial market under the enjoyment of the Lanham Act's protections and yet to spurn the reciprocal obligation clearly imposed by Congress of amenability to the remedial as well as the substantive provisions of that Act to assure fairness to all who compete in that market.

* * * * *

---

undermines our position, by (1) demonstrating that Congress is capable of making nuanced judgments regarding the appropriate treatment of State-run commercial enterprises (and the extent to which such enterprises should be subject to the rules that govern their private competitors), and (2) reinforcing our contention (cf. Gov't Br. 28-29) that respondent's amenability to suit in federal court represents a reasonable price for benefits afforded by federal law.

For the reasons stated above, and in the opening brief for the United States, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

APRIL 1999